SUPREME COURT, U. S.

Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-1407

ALFRED C. YSRAEL,
Petitioner,

vs.

GUAM FEDERATION OF TEACHERS, LOCAL 1581 OF THE AMERICAN FEDERATION OF TEACHERS, a corporation, CONRAD G. STINSON, ROBERT W. KLITZKIE, JAMES R. DOAK, WILLIAM K. BUNYAN, MARY J. KIMBROUGH, PEGGY CLEVELAND, and ROBERT W. COBLE,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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OPINIONS BELOW

The District Court's opinion[1] is unreported. The opinion of the Ninth Circuit[2] is reported at ..... F.2d ..... (9th Cir. 1974).

[1]Appendix A.
[2]Appendix B.

JURISDICTION

The Ninth Circuit's judgment was entered on February 1, 1972. Jurisdiction to review that judgment by writ of certiorari is conferred on this Court by 28 U.S.C. § 1254(1).

QUESTIONS

In a "New York Times" libel case, is the party against whom a motion for summary judgment, directed verdict, or judgment notwithstanding the verdict is made entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor? Are the District Court judge and the Court of Appeals without authority to weigh credibility or to choose among legitimate inferences in such a case?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

"*Congress shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof, or *abridging the freedom of speech, or the press;* or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[3]

"*No law shall be enacted in Guam* respecting an establishment of religion or prohibiting the free exercise thereof, or *abridging the freedom*

[3]U.S. CONST. amend. I (emphasis added).

of speech, or of the press, or the right of the people peaceably to assemble and to petition the government for a redress of their grievances."[4]

"*The following provisions of and amendments to the Constitution of the United States are hereby extended to Guam to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States:* article I, section 9, clauses 2 and 3; article IV, section 1 and section 2, clause 1; *the first to ninth amendments inclusive;* the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments.

"All laws enacted by Congress with respect to Guam and all laws enacted by the territorial legislature of Guam which are inconsistent with the provisions of this subsection are repealed to the extent of such inconsistency."[5]

THE CASE

Basis for jurisdiction in District Court.

"*The District Court of Guam* shall have the jurisdiction of a district court of the United States in all causes arising under the Constitution, treaties, and laws of the United States, regardless of the sum or value of the matter in controversy, *shall have original jurisdiction in all other causes*

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[4] 48 U.S.C. § 1421b(a) (emphasis added).
[5] 48 U.S.C. § 1421b(u) (emphasis added).

in Guam, jurisdiction over which has not been transferred by the legislature to other court or courts established by it, and shall have such appellate jurisdiction as the legislature may determine."[6]

Nature of case.

This is an action for libel.

Course of Proceedings in District Court.

The case was tried by a jury.

Petitioner moved for a directed verdict:

"Defendant moves the court for a directed verdict in his favor and against plaintiffs on the ground that plaintiffs have not with convincing clarity proven that the statements alleged in the complaint were made with actual malice, that is, with knowledge that they were false or with reckless disregard of whether they were false or not."[7]

Disposition in District Court.

The motion was granted:

"This is an action on defamation, or more specifically an action on libel brought by the Guam Federation of Teachers, a corporation and the other plaintiffs named in the complaint who were officials of the Guam Federation of Teachers in December 1970 and January 1971.

"The action arose out of alleged libellous statements appearing on the Pacific Daily News on

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[6]48 U.S.C. § 1424(a) (emphasis added).

[7]Motion, Record at 145.

December 15, 17 and 24, 1970 issues and on the January 7, 1971 issue of said Daily News.

"On December 2, 1970, the defendant was appointed by the Governor as a member of the Board of Education, Government of Guam. There is nothing under Guam law precluding an appointee to a commission or board within the Government to commence his active participation as a member of said commission or board ensuing his being sworn in and even prior to his receiving confirmation by the Guam Legislature. Immediately following his appointment to the Board, the defendant assumed active participation on matters before the Board, even going to the extent of raising questions regarding issues covered in the contract entered into between the Board of Education and the plaintiff union prior to defendant's appointment to the Board.

"On December 14, 1970, the plaintiff union in its Season's Greeting newsletter stated that the union members present at a prior meeting unanimously voted to work toward blocking Defendant's School Board confirmation; and that it was the union's official position that it will try to convince the Legislature that the defendant should not be confirmed. This same statement was published on the December 15, 1970 issue of the Pacific Daily News. Initially, the union sought to block defendant's confirmation on a purported conflict of interest.

"Once the issue of confirmation was raised, the controversy broadened, and it resulted in a matter of news releases made by one party and a rebuttal by the other through the medium of the Pacific Daily News.

"Materials were also submitted to the Legislature by the plaintiff union for the purpose of defeating defendant's confirmation by the Legislature.

"Education in Guam, like anywhere else, is an issue of paramount importance. Membership in the Board of Education is a very responsible office as the board is charged with matters of educational policies. Pros and cons surrounding the appointment of defendant to the Board of Education, and their consistent publications in a news media of general circulation leaves no doubt that it is a matter of *'public issue'* within the meaning of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). Sufficient public interests have been generated.

"In *Bon Air Hotel, Inc. v.* [*Time*], *Inc.*, 426 F.2d 858 (5th Cir. 1970), the United States Court of Appeals for the 5th Circuit held that publications concerning matters of public interest are protected by the First Amendment of the United States [Constitution] absent proof of actual malice.

"The defendant, ensuing the closing of plaintiff's case, did not see fit to proceed any further. The defendant, having then rested his case, under a motion for a directed verdict on the ground that plaintiffs have failed to sustain their burden of establishing by clear and convincing evidence that the publications made by defendant were made with actual malice.

"*Actual malice* is a constitutional issue to be decided initially by the trial judge vis-a-vis motions for summary judgment and directed verdict. *Bon Air Hotel, Inc. v.* [*Time*], *Inc., supra.*

"In making this judgment, the Court will judge the credibility of the witnesses and draw its own inferences from the evidence.

"A publication is made with actual malice if it is made with knowledge that it is false, or with reckless disregard of whether it is false or not.

"Recklessness implies a higher degree of culpability than negligence. A failure to exercise ordinary or reasonable care in ascertaining the truth of the public materials do not, standing alone, render the defendant liable. The plaintiffs must prove that the defendant had a high degree of awareness of the probable falsity of the statements published.

"In *Garrison v. Louisiana,* 379 U.S. [64], the Supreme Court defined 'reckless disregard' as a high degree of awareness of their probable falsity and with serious doubts as to their truth.

"The publications made by the defendant were in some instances not entirely accurate. Some of the statements made by the defendant were not entirely true; some of the statements were matters where reasonable men might differ. Truth or falsity of a publication, however, is not the constitutional test. The constitutional test is that the statements must be published with actual knowledge of their falsity or with reckless disregard of their falsity.

"As has been noted before, actual malice is a constitutional issue to be determined by the trial judge on a motion for a directed verdict.

"The Court has found from the evidence—testimony of the witnesses and the admitted exhibits —that the plaintiffs have failed to establish by a

clear convincing evidence that the defendant did publish the statements or articles with actual knowledge of their falsity or with reckless disregard as to whether or not it is false.

"In the absence of proof of actual malice, the Court will grant the motion for a directed verdict and judgment will issue thereto."[8]

Course of Proceedings in Ninth Circuit.

Petitioner argued that it was proper for the District Court to judge the credibility of the witnesses and draw his own inferences from the evidence:

"Guam Federation of Teachers states, 'The sole question on appeal is this: did the testimony and evidence at the trial establish [actual] malice sufficiently for the case to go to the jury?' and it contends that '"*in determining whether the evidence is sufficient the court is not free to weigh the evidence or to pass on the credibility of witnesses or to substitute its judgment of the facts for that of the jury.*"'

"This contention is wrong.

"The trial court judged the credibility of the witnesses and drew its own inferences from the evidence. . . .

"This was proper. . . ."[9]

Disposition in Ninth Circuit.

The Court of Appeals reversed the District Court's judgment and remanded the action for further proceedings:

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[8]Order Granting Motion for Directed Verdict, Record at 154-57 (emphasis added).

[9]Defendant-Appellee's Brief at 5-6 (footnotes omitted).

"DUNIWAY, Circuit Judge:

"Plaintiffs, the Guam Federation of Teachers (Union), and seven of its officers sue Ysrael for libel. The case was tried before a jury. At the conclusion of the plaintiffs' case, Ysrael moved for a directed verdict, which was granted. Judgment was entered for Ysrael. Plaintiffs appeal and we reverse.

"Ysrael was appointed a member of the Guam territorial School Board by the Governor of Guam. The Union strenuously opposed the appointment and the matter developed into a public row. In the course of it, Ysrael caused various statements about the Union and its officers to be published in a Guam newspaper, the Pacific Daily News.

"On this appeal the parties are in agreement that the Union and its officers are 'public officials,' or at least 'public figures' within the rationale of *New York Times Co. v. Sullivan,* 1964, 376 U.S. 254, and its progeny, particularly *Curtis Publishing Co. v. Butts,* 1967, 388 U.S. 130. It is not contended that the individual plaintiffs, though not specifically named in Ysrael's press statements, are not identifiable members of the group to which Ysrael referred. *Rosenblatt v. Baer,* 1966, 383 U.S. 75. It is not contended that at least some of Ysrael's statements to the press are not libelous. It is not contended that a jury could not find that they are false. The only question is, were the plaintiffs entitled to have their cause go to the jury on the issue of malice?

"The test for malice, laid down in *New York Times, supra,* and repeatedly applied in its numerous progeny is that the statement must have

been 'made with "actual malice"—that is, with knowledge that it was false or with reckless disregard *of whether it was false or not.*' (*376* U.S. at 279-80) The court also ruled that the proof of malice must carry 'the convincing clarity which the constitutional standard demands' (*Id* at 285-6).

"We have examined the plaintiffs' evidence and we conclude that it would permit a jury to find 'actual malice' as defined in *New York Times, supra,* when viewed in the light most favorable to the plaintiffs. This is the usual standard for viewing the evidence when a motion for a directed verdict is involved. When such a motion is granted, the losing party is entitled to every reasonable inference that may be drawn from the evidence. *Brady v. Southern Ry. Co.,* 1943, 320 U.S. 476; *Shafer v. Mountain States Tel. & Tel. Co.,* 9 Cir., 1964, 335 F.2d 932; *Girardi v. Gates Rubber Co. Sales Div., Inc.,* 9 Cir., 1963, 325 F.2d 196. These rules are so well established as to have become clichés.

"In this case, Ysrael's own testimony as an adverse witness is enough to get the plaintiffs to the jury under the *New York Times* standards. He repeatedly admitted that he did not know whether what he said was true. He repeatedly admitted that he did nothing, or almost nothing, to verify his charges. As to most of his statements, he repeatedly admitted that he knew of no facts to support them; he either relied upon unspecified rumor or upon nothing at all. He simply asserted that he believed that what he said was true. Such an assertion is not enough to support a directed verdict in his favor. If it

were, more swearing could, as a matter of law, defeat any action to which the *New York Times principles are applicable.* See *St. Amant v. Thompson,* 1968, 390 U.S. 727, 732.

"Ysrael's counsel does not really dispute the foregoing general propositions. He argues that they do not apply to this type of case. The district judge, in granting the motion for a directed verdict, took the same position. In his written order, he said:

> '*Actual malice* is a constitutional issue to be decided initially by the trial judge vis-à-vis motions for summary judgment and directed verdict. *Bon Air Hotel, Inc. v. Times,* [*sic*] *Inc., supra.* [5 Cir., 1970, 426 F.2d 853]
>
> In making this judgment, the Court will judge the credibility of the witnesses and draw its own inferences from the evidence.
>
> . . . Truth or falsity of a publication, however, is not the constitutional test. The constitutional test is that the statements must be published with actual knowledge of their falsity or with reckless disregard of their falsity.
>
> As has been noted before, actual malice is a constitutional issue to be determined by the trial judge on a motion for a directed verdict.
>
> The Court has found from the evidence—testimony of the witnesses and the admitted exhibits,—that the plaintiffs have failed to establish by a clear convincing evidence that the defendant did publish the statements or articles with actual knowledge of their falsity or with reckless disregard as to whether or not it is false.'

"The views involved in the court's order seem to have been first stated by Judge J. Skelly Wright in his concurring opinion in Wasserman v. Time, Inc., D.C. Cir., 1970, 424 F.2d 920, 922-3, *an opinion in which Judge Robinson concurred.* Judge Wright's position is this:

> 'In my judgment New York Times Co. v. Sullivan makes actual malice a constitutional issue to be decided in the first instance by the trial judge applying the *Times* test of actual knowledge or reckless disregard of the truth. . . . Unless the court finds on the basis of pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice in the *Times* sense, it should grant summary judgment for the defendant.
>
> . . . If the case survives the defendant's summary judgment motion, the trial court at the close of the plaintiff's case must decide whether actual malice has been shown with "convincing clarity." In making this judgment the court will judge the credibility of the witnesses and draw its own inferences from the evidence. If the trial is permitted to proceed, the court will be called upon again to make a judgment on the actual malice issue at the close of all of the evidence.' (Citations and footnotes omitted.)

"What Judge Wright said was not necessary to the decision, because in *Wasserman* the court reversed a summary judgment for the defendant and remanded 'for trial on the issues of actual malice, defamation and possible damages.' However, we assume that Judges Wright and Robin-

son may have gone through the exercise that Judge Wright describes.

"*Judge Wright's views were followed by the Fifth Circuit in Bon Air Hotel, Inc. v. Time, Inc.*, 5 Cir., 1970, 426 F.2d 858, 864-5. We are not sure, however, as to just how far the court actually went. It summarized the legal position:

> 'Numerous courts have found summary judgment for publishers proper where the record is devoid of genuine issues of fact as to whether the alleged defamatory statement was published with actual knowledge of its falsity or with a reckless disregard of whether it was true or false. Other courts, however, have not allowed a publisher's motion for summary judgment where facts were presented from which a jury could find that a statement was made with actual malice.' (Footnotes omitted.)

"We note that this language does not include a reweighing of the evidence, including credibility of witnesses: it merely states the usual rule to be followed when summary judgment is involved. The court's analysis of the facts (pp. 865-7) is similar. It concludes:

> 'We are convinced that Bon Air has not presented issues of fact from which a jury could find that Time published the article with actual knowledge of its falsity or with a reckless disregard as to whether or not it was false.[21]'

"The footnote reads:

> '21. The following statement by Judge Tuttle in *McLaney* [*Time, Inc. v. McLaney*, 5 Cir., 1969, 406 F.2d 565] seems pertinent here:

> "Where * * * it is plain that the record has been fully developed by depositions and affidavits on a motion for summary judgment, and such record demonstrates that, construing all of the facts and inferences to be drawn therefrom in favor of the party against whom the judgment is entered, he would not be entitled to have a jury verdict stand, we have not hesitated to hold that the grant of summary judgment is proper." 406 F.2d at 571-572.'

"We find no hint in this language that the judge is to weigh credibility, or to refuse to give a party the benefit of inferences that can legitimately be drawn by a jury. However, because the court did cite and quote from Judge Wright's opinion, we assume that the court in fact went through the exercise that Judge Wright suggests.

"*We agree with our brothers of the District of Columbia and Fifth Circuits that it is important that judges focus attention on the summary judgment, directed verdict and judgment notwithstanding the verdict procedures in libel actions.* When civil cases may have a chilling effect on First Amendment rights, special care is appropriate. Thus, a judicial examination at these stages of the proceeding, closely scrutinizing the evidence to determine whether the case should be terminated in a defendant's favor, provides a buffer against possible First Amendment interferences. The Supreme Court has instructed trial courts to 'examine for [themselves] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First

Amendment . . . protect.' To be unprotected, actual malice must be shown with 'convincing clarity.' *New York Times, supra,* 376 U.S. at 285-86.

"However, with respect, we are not persuaded by the second phase of Judge Wright's analysis in Wasserman *which suggests that in deciding these motions, the trial court should judge the credibility of witnesses and draw its own inferences from the evidence. We think that in a libel case, as in other cases, the party against whom a motion for summary judgment, a motion for a directed verdict, or a motion for a judgment notwithstanding the verdict is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of fact. We think, too, that in such cases it is not only not the duty of the judge, or of this court of appeal, to weigh the credibility of the evidence, or to draw inferences in favor of the moving party (except, of course, when no contrary inference can legitimately be drawn), but that neither the judge nor this court on appeal has the authority to weigh credibility or to choose among legitimate inferences in such cases.*

"The *standard* against which the evidence must be examined is that of *New York Times* and its progeny. *But the* manner *in which the evidence is to be examined in the light of that standard is the same as in all other cases in which it is claimed that a case should not go the jury.* If the evidence, so considered, measures up to the *New York Times* standard, the case is one for the jury, and it is error to grant a directed verdict, as the trial judge did in this case.

"We do not think that the authorities on which Judge Wright relies sustain his thesis. *Jackson v. Denno,* 1964, 378 U.S. 368, deals with the admissibility of evidence, a very different matter from the weight or credit to be given to admissible evidence. It may well be that its procedure ought to be followed in libel cases—a determination by the trial judge, on the record, and sufficiently articulated to be helpful to a reviewing court, as to whether plaintiff has presented sufficient evidence to go to the jury. But that is a far cry from the next step that Judge Wright would take, that is, a change in the manner in which the judge is to examine the evidence.

"Rosenblatt v. Baer, 1966, 383 U.S. 75, 88, deals with privilege—whether the evidence shows the plaintiff to be a public official. It says nothing about how the trial judge is to view the evidence in making that determination.

"In *New York Times, supra,* 376 U.S. at 284-6, the Court said:

> 'Since respondent may seek a new trial, we deem that considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. . . . We must "make an independent examination of the whole record." *Edwards v. South Carolina,* 372 U.S. 229, 235, so as to assure ourselves that the

judgment does not constitute a forbidden intrusion on the field of free expression.[26]'

"And in a footnote, the Court commented on the relationship between such an examination and the constitutional right to jury trial:

'26. The Seventh Amendment does not, as respondent contends, preclude such an examination by this Court. . . . But its ban on re-examination of facts does not preclude us from determining whether governing rules of federal law have been properly applied to the facts. "[T]his Court will review the finding of facts by a State court . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *Fiske v. Kansas,* 274 U.S. 380, 385-386. See also *Haynes v. Washington,* 373 U.S. 503, 515-516.'

"We find nothing in this language to indicate that the Court's examination was to disregard the usual rules for determining whether a case should go to the jury. It merely requires a reexamination as to whether the evidence, viewed most favorably to the plaintiff, is sufficient to meet the *New York Times* standard if the jury accepts it.

"Subsequent decisions seem to us to bear out the foregoing views. In *Rosenblatt v. Baer,* 1966, 383 U.S. 75, 87, after holding that the case fell within the principles of *New York Times,* the Court said:

'Moreover, even if the claim falls within *New York Times,* the record suggests respondent

> may be able to present a jury question of malice as there defined.'

"There is no hint that the Court reached this position by deciding the credibility of witnesses or selecting between permissible inferences.

"In *Time, Inc. v. Hill,* 1967, 385 U.S. 375, at 391, the Court said:

> 'Turning to the facts of the present case, the proofs reasonably would support either a jury finding of innocent or merely negligent misstatement by Life, or a finding that Life portrayed the play as a re-enactment of the Hill family's experience reckless of the truth or with actual knowledge that the portrayal was false.'

"Again, we find no hint that the evidence was weighed as Judge Wright would weigh it. Reversal was based upon error in instructions to the jury.

"In *Beckley Newspapers v. Hanks,* 1967, 389 U.S. 81, the Court reversed on the ground of insufficiency of the evidence, but there is nothing in the opinion to support Judge Wright's thesis. On the contrary, the Court merely held that the proof was not 'sufficient to present a jury question.' (p. 85) *See also St. Amant v. Thompson,* 1968, 390 U.S. 727, 732; *Rosenbloom v. Metromedia, Inc.,* 1971, 403 U.S. 29, 55.

"Nor do the court of appeals decisions cited by Judge Wright support his conclusions. In *The Washington Post Co. v. Keogh,* D.C. Cir., 1966, 365 F.2d 965, we find no hint that the court of appeals was making its own judgment as to cred-

ibility. Indeed, the court purported to apply the following rule:

> 'First, the right to trial by jury is at stake, so courts must be ever careful to grant summary judgment only when no issue of fact is controverted or turns upon a choice between permissible inferences from undisputed evidence.' (at 967.)

"*Goldwater v. Ginzburg,* 2 Cir., 1969, 414 F.2d 324, *Cert. denied,* 1970, 396 U.S. 1049, applies the normal rule (p. 337):

> 'Viewing the submitted materials and the inferences which might be drawn from them "in the light most favorable to the party opposing the motion" United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962), the district court properly concluded that a trier of fact should have the opportunity to decide whether appellants were liable to appellee.'

"So does *Time, Inc. v. Ragano,* 5 Cir. 1970, 427 F.2d 219, 221.

"In the present case, the plaintiffs' evidence, *viewed in the light most favorable to them,* is sufficient to meet the *New York Times* standard. The case should have gone to the jury.

"The judgment is reversed and the case is remanded for further proceedings.

"WALLACE, Circuit Judge (Concurring and Dissenting):

"I concur that the trial judge applied the wrong standard when he granted the motion for a directed verdict. I believe the majority opinion

describes the proper standard to be applied. However, I would remand the case to allow the trial court to reconsider the motion in the first instance under the guidelines established by this opinion."[10]

ARGUMENT

1. THE NINTH CIRCUIT'S DECISION, THAT IN A "NEW YORK TIMES" LIBEL CASE, THE PARTY AGAINST WHOM A MOTION FOR SUMMARY JUDGMENT, DIRECTED VERDICT, OR JUDGMENT NOTWITHSTANDING THE VERDICT IS MADE IS ENTITLED TO HAVE THE EVIDENCE VIEWED IN THE LIGHT MOST FAVORABLE TO HIM AND TO ALL INFERENCES THAT CAN PROPERLY BE DRAWN IN HIS FAVOR, AND THAT NEITHER A DISTRICT COURT JUDGE NOR A COURT OF APPEALS HAS THE AUTHORITY TO WEIGH CREDIBILITY OR TO CHOOSE AMONG LEGITIMATE INFERENCES IN SUCH A CASE, IS IN DIRECT CONFLICT WITH DECISIONS OF THE DISTRICT OF COLUMBIA, FIFTH, AND EIGHTH CIRCUITS ON THE VERY SAME MATTER.

Wasserman v. Time, Inc., 424 F.2d 920 (D.C. Cir. 1970), *cert. denied*, 398 U.S. 940 (1970):

> "J. SKELLY WRIGHT, Circuit Judge (concurring):
>
> "I concur in the court's opinion. My attempt here is to set out what I conceive to be the proper procedure in handling the issue of actual malice in New York Times Co. v. Sullivan cases.
>
> "In my judgment New York Times Co. v. Sullivan makes actual malice a constitutional issue to be decided in the first instance by the trial judge applying the *Times* test of actual knowledge or reckless disregard of the truth. *Cf.*

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[10]Guam Fed'n of Teachers, Local 1581 of the Am. Fed'n of Teachers v. Ysrael, ... F.2d ....., ...-..... (9th Cir. 1974) (emphasis added).

Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). Unless the court finds, on the basis of pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice in the *Times* sense, it should grant summary judgment for the defendant. Washington Post Co. v. Keogh, 125 U.S. App.D.C. 32, 365 F.2d 965, 20 A.L.R.3d 972 (1966), cert. denied, 385 U.S. 1011, 87 S.Ct. 708, 17 L.Ed.2d 548 (1967). Compare Goldwater v. Ginzburg, 2 Cir., 414 F.2d 324, 336-337 (1969), cert. denied, 396 U.S. 1049, 90 S.Ct. 701, 24 L.Ed. 2d 695 (1970).

"If the case survives the defendant's summary judgment motion, *the trial court at the close of the plaintiff's case must decide whether actual malice has been shown with 'convincing clarity.' In making this judgment the court will judge the credibility of the witnesses and draw its own inferences from the evidence.* If the trial is permitted to proceed, the court will be called upon again to make a judgment on the actual malice issue at the close of all of the evidence. If the motion for a directed verdict at this stage of the trial is denied, the actual malice issue, along with the other issues, is then submitted to the jury under the *Times* instruction without any indication from the court or counsel that the court has decided that the evidence shows actual malice with 'convincing clarity.'

"This two-step procedure in which *both* the trial judge and the jury must find actual malice before there can be judgment for the plaintiff provides the protection of the First Amendment freedom that *Times* sought to make secure in areas of pub-

lic concern. As the Court stated in Rosenblatt v. Baer in support of its requirement that the trial judge in the first instance determine whether the evidence shows the plaintiff in a libel suit to be a public official: 'Such a course will both lessen the possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers, and assure an appellate court the record and findings required for review of constitutional decisions. Cf. Speiser v. Randall, 357 U.S. 513, 525 [78 S.Ct. 1332, 1341, 2 L.Ed.2d 1460]; *New York Times*, 376 U.S. at 285 [84 S.Ct. 710].' 383 U.S. at 88 n. 15, 86 S.Ct. at 677.

"I am authorized to say that Judge SPOTTSWOOD W. ROBINSON, III, concurs in this opinion."[11]

Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970):

"Actual malice is a constitutional issue to be decided initially by the trial judge vis-a-vis motions for summary judgment and directed verdict. The functions of the trial court judge and the jury have been explained as follows:

'In my judgment New York Times Co. v. Sullivan makes actual malice a constitutional issue to be decided in the first instance by the trial judge applying the *Times* test of actual knowledge or reckless disregard of the truth. Cf. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). Unless the court finds, on the basis of pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice in the *Times*

[11] 424 F.2d at 922-23 (footnotes omitted (emphasis added).

sense, it should grant summary judgment for the defendant. * * *

'If the case survives the defendant's summary judgment motion, *the trial court at the close of the plaintiff's case must decide whether actual malice has been shown with "convincing clarity." In making this judgment the court will judge the credibility of the witnesses and draw its own inferences from the evidence.* If the trial is permitted to proceed, the court will be called upon again to make a judgment on the actual malice issue at the close of all of the evidence. If the motion for a directed verdict at this stage of the trial is denied, the actual malice issue, along with the other issues, is then submitted to the jury under the *Times* instruction without any indication from the court or counsel that the court has decided that the evidence shows actual malice with "convincing clarity."' [Citations and footnotes omitted].

"Wasserman v. Time, Inc., 414 F.2d 920, p. 922 (D.C.Cir.1970) (Wright J., concurring) Such a two-step procedure 'provides the protection of the First Amendment freedom that *Times* sought to make secure in areas of public concern' *Id.* at 923. *Compare* Rosenblatt v. Baer, 383, U.S. 75, 88 n. 15, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966)."[12]

Berry v. Nat'l Broadcasting Co., Inc., 480 F.2d 428 (8th Cir. 1973), *petition for cert. filed*, 42 U.S.L.W. 3151 (U.S. Sept. 11, 1973) (No. 73-467):

"Ordinarily, we would resolve the question by examining the evidence in a light most favorable to the party having the verdict and overturn it

[12]426 F.2d at 864 (emphasis added).

only if the verdict were clearly erroneous. In First Amendment cases however, this Court must make an independent judgment as to whether the facts will support a verdict for the plaintiff without abridging the rights of freedom of speech and press as guaranteed by the First and Fourteenth Amendments. [New York Times v. Sullivan, supra; Rosenbloom v. Metromedia, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296.]"[13]

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2. **THE NINTH CIRCUIT HAS DECIDED CERTAIN FEDERAL QUESTIONS, THAT IS TO SAY, WHETHER IN A "NEW YORK TIMES" LIBEL CASE THE PARTY AGAINST WHOM A MOTION FOR SUMMARY JUDGMENT, DIRECTED VERDICT, OR JUDGMENT NOTWITHSTANDING THE VERDICT IS MADE IS ENTITLED TO HAVE THE EVIDENCE VIEWED IN THE LIGHT MOST FAVORABLE TO HIM AND TO ALL INFERENCES THAT CAN PROPERLY BE DRAWN IN HIS FAVOR, AND WHETHER A DISTRICT JUDGE OR A COURT OF APPEALS HAS THE AUTHORITY TO WEIGH CREDIBILITY OR TO CHOOSE AMONG LEGITIMATE INFERENCES IN SUCH A CASE, IN A WAY IN DIRECT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.**

New York Times Co. v. Sullivan, 376 U.S. 254 (1964):

"Since respondent may seek a new trial, we deem that considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitu-

[13]480 F.2d at 432.

tionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' *Speiser v. Randall*, 357 U.S. 513, 525. In cases where that line must be drawn, the rule is that we 'examine *for ourselves* the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' *Pennekamp v. Florida*, 328 U.S. 331, 335; see also *One, Inc., v. Olesen*, 355 U.S. 371; *Sunshine Book Co. v. Summerfield*, 355 U.S. 372. We must 'make an *independent* examination of the whole record,' *Edwards v. South Carolina*, 372 U.S. 229, 235, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

"Applying these standards, we consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law."[14]

Rosenblatt v. Baer, 383 U.S. 75 (1966):

"Because the trial here was had before *New York Times*, we have concluded that we should not foreclose him from attempting retrial of his action. We remark only that, as is the case with questions of privilege generally, *it is for the trial judge in*

[14]376 U.S. at 284-86 (footnote omitted) (emphasis added).

the first instance to determine whether the proofs show respondent to be a 'public official.'"[15]

Time, Inc. v. Pape, 401 U.S. 279 (1971):

"The only question before us, therefore, is whether the Court of Appeals correctly applied this constitutional rule to the facts of this case in reversing the directed verdict for the defendant. Inquiries of this kind are familiar under the settled principle that '[i]n cases in which there is a claim of denial of rights under the Federal Constitution, *this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded.*' *Niemotko v. Maryland*, 340 U.S. 268, 271. Cf. *Napue v. Illinois*, 360 U.S. 264, 271-272. And in cases involving the area of tension between the First and Fourteenth Amendments on the one hand and state defamation laws on the other, we have frequently had occasion to review 'the evidence in the . . . record to determine whether it could *constitutionally* support a judgment' for the plaintiff. *New York Times, supra*, at 284-285; *Beckley Newspapers v. Hanks*, 389 U.S. 81, 83; *St. Amant v. Thompson*, 390 U.S. 727; *Greenbelt Cooperative Publishing Assn. v. Bresler*, 398 US 6, 11."[16]

Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971):

"[E]ven assuming that instructions were given satisfying the standard of knowing or reckless

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[15]383 U.S. at 87-88 (footnote omitted) (emphasis added).

[16]401 U.S. at 284 (emphasis added).

> falsity, the evidence was insufficient to sustain an award for the petitioner under that standard. In these cases our 'duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been *constitutionally* applied.' *New York Times Co. v. Sullivan*, 376 U.S. at 285. Our *independent* analysis of the record leads us to agree with the Court of Appeals that none of the proofs, considered either singly or cumulatively, satisfies the constitutional standard with the convincing clarity necessary to raise a jury question whether the defamatory falsehoods were broadcast with knowledge that they were false or with reckless disregard of whether they were false or not."[17]

See *Dun & Bradstreet, Inc. v. Grove, Trustee, et al.*, 404 U.S. 898 (1971):

> "[O]n at least ten recent occasions, including the *New York Times* case, . . . majorities declined to remand for further jury proceedings but instead in each case examined the record, *weighed the evidence*, found it insufficient, and absolved the publisher."[18]

Wherefore Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in Guam Federation of Teachers, Local 1581 of the American

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[17] 403 U.S. at 54-55 (emphasis added).

[18] 404 U.S. at 902 (dissenting opinion) (footnote omitted) (emphasis added).

Federation of Teachers, et al., Plaintiffs-Appellants, v. Alfred C. Ysrael, Defendant-Appellee, No. 73-1444.

Dated, Agana, Guam,
March 18, 1974.

HOWARD TRAPP,
Attorney for Petitioner.

(Appendices Follow)

Appendix A

District Court of Guam
Territory of Guam

Civil Case No. 12-71

Guam Federation of Teachers, Local 1581 of the American Federation of Teachers, et al.,
Plaintiffs,

vs.

Alfred C. Ysrael,
Defendant.

[Filed October 17, 1972]

ORDER GRANTING MOTION FOR DIRECTED VERDICT

This is an action on defamation, or more specifically an action on libel brought by the Guam Federation of Teachers, a corporation and the other plaintiffs named in the complaint who were officials of the Guam Federation of Teachers in December 1970 and January 1971.

The action arose out of alleged libellous statements appearing on the Pacific Daily News on the December 15, 17 and 24, 1970 issues and on the January 7, 1971 issue of said Daily News.

On December 2, 1970, the defendant was appointed by the Governor as a member of the Board of Education, Government of Guam. There is nothing under Guam law precluding an appointee to a commission or board within the Government to commence his active participation as a member of said commission or board ensuing his being sworn in and even prior to his receiving confirmation by the Guam Legislature. Immediately following his appointment to the Board, the defendant assumed active participation on matters before the Board, even going to the extent of raising questions regarding issues covered in the contract entered into between the Board of Education and the plaintiff union prior to defendant's appointment to the Board.

On December 14, 1970, the plaintiff union in its Season's Greetings newsletter stated that the union members present at a prior meeting unanimously voted to work toward blocking Defendant's School Board confirmation; and that it was the union's official position that it will try to convince the Legislature that the defendant should not be confirmed. This same statement was published on the December 15 1970 issue of the Pacific Daily News. Initially, the union sought to block defendant's confirmation on a purported conflict of interest.

Once the issue of confirmation was raised, the controversy broadened, and it resulted in a matter of news releases made by one party and a rebuttal by the other through the medium of the Pacific Daily News.

Materials were also submitted to the Legislature by the plaintiff union for the purpose of defeating defendant's confirmation by the Legislature.

Education in Guam, like anywhere else, is an issue of paramount importance. Membership in the Board of Education is a very responsible office as the board is charged with matters of educational policies. Pros and cons surrounding the appointment of defendant to the Board of Education, and their consistent publications in a news media of general circulation leaves no doubt that it is a matter of *"public issue"* within the meaning of *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29 1971). Sufficient public interests have been generated.

In *Bon Air Hotel, Inc. v. Times, Inc.,* 426 F.2d 858 (5th Cir. 1970), the United States Court of Appeals for the 5th Circuit held that publications concerning matters of public interest are protected by the First Amendment of the United States absent proof of actual malice.

The defendant, ensuing the closing of plaintiff's case, did not see fit to proceed any further. The defendant, having then rested his case, made a motion for a directed verdict on the ground that plaintiffs have failed to sustain their burden of establishing by clear and convincing evidence that the publications made by defendant were made with actual malice.

Actual malice is a constitutional issue to be decided initially by the trial judge vis-a-vis motions for sum-

mary judgment and directed verdict. *Bon Air Hotel, Inc. v. Times, Inc., supra.*

In making this judgment, the Court will judge the credibility of the witnesses and draw its own inferences from the evidence.

A publication is made with actual malice if it is made with knowledge that it is false, or with reckless disregard of whether it is false or not.

For plaintiffs to prove actual malice, they must establish that the defendant made the publications with knowledge that they were false, or with reckless disregard of whether it is false or not.

Recklessness implies a higher degree of culpability than negligence. A failure to exercise ordinary or reasonable care in ascertaining the truth of the public materials do not, standing alone, render the defendant liable. The plaintiffs must prove that the defendant had a high degree of awareness of the probable falsity of the statements published.

In *Garrison v. Louisiana,* 379 U.S. 74, the Supreme Court defined "reckless disregard" as a high degree of awareness of their probable falsity and with serious doubts as to their truth.

The publications made by the defendant were in some instances not entirely accurate. Some of the statements made by the defendant were not entirely true; some of the statements were matters where reasonable men might differ. Truth or falsity of a publication, however, is not the constitutional test. The constitutional test is that the statements must be pub-

lished with actual knowledge of their falsity or with reckless disregard of their falsity.

As has been noted before, actual malice is a constitutional issue to be determined by the trial judge on a motion for a directed verdict.

The Court has found from the evidence—testimony of the witnesses and the admitted exhibits,—that the plaintiffs have failed to establish by a clear convincing evidence that the defendant did publish the statements or articles with actual knowledge of their falsity or with reckless disregard as to whether or not it is false.

In the absence of proof of actual malice, the Court will grant the motion for a directed verdict and judgment will issue thereto.

It Is So Ordered.

Dated at Agana, Guam, this 17th day of October, 1972.

/s/ Cristobal C. Duenas
Cristobal C. Duenas
Judge, District Court of Guam

Appendix B

United States Court of Appeals
for the Ninth Circuit

Guam Federation of Teachers, Local 1581, of the American Federation of Teachers, a corporation, Conrad G. Stinson, Robert W. Klitzkie, James R. Doak, William K. Bunyan, Mary J. Kimbrough, Peggy Cleveland and Robert W. Coble, Plaintiffs-Appellants, vs. Alfred C. Ysrael, also known as Al Ysrael, *Defendant-Appellee.*	No. 73-1444

[February 1, 1974]

Appeal from the District Court of Guam
Territory of Guam

Before: DUNIWAY, TRASK and WALLACE,
Circuit Judges.

OPINION

DUNIWAY, Circuit Judge:

Plaintiffs, the Guam Federation of Teachers (Union), and seven of its officers sue Ysrael for libel. The case was tried before a jury. At the conclusion of the plaintiffs' case, Ysrael moved for a directed verdict, which was granted. Judgment was entered for Ysrael. Plaintiffs appeal and we reverse.

Ysrael was appointed a member of the Guam Territorial School Board by the Governor of Guam. The Union strenuously opposed the appointment and the matter developed into a public row. In the course of it, Ysrael caused various statements about the Union and it officers to be published in a Guam newspaper, the Pacific Daily News.

On this appeal the parties are in agreement that the Union and its officers are "public officials," or at least "public figures" within the rationale of *New York Times Co. v. Sullivan,* 1964, 376 U.S. 254, and its progeny, particularly *Curtis Publishing Co. v. Butts,* 1967, 388 U.S. 130. It is not contended that the individual plaintiffs, though not specifically named in Ysrael's press statements, are not identifiable members of the group to which Ysrael referred. *Rosenblatt v. Baer,* 1966, 383 U.S. 75. It is not contended that at least some of Ysrael's statements to the press are not libelous. It is not contended that a jury could not find that they are false. The only question is, were the plaintiffs entitled to have their cause go to the jury on the issue of malice?

The test for malice, laid down in *New York Times, supra,* and repeatedly applied in its numerous progeny is that the statement must have been "made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (376 U.S. at 279-80) The court also ruled that the proof of malice must carry "the convincing clarity which the constitutional standard demands" (*Id.* at 285-6).

We have examined the plaintiffs' evidence and we conclude that it would permit a jury to find "actual malice" as defined in *New York Times, supra,* when viewed in the light most favorable to the plaintiffs. This is the usual standard for viewing the evidence when a motion for a directed verdict is involved. When such a motion is granted, the losing party is entitled to every reasonable inference that may be drawn from the evidence. *Brady v. Southern Ry. Co.,* 1943, 320 U.S. 476; *Shafer v. Mountain States Tel. & Tel. Co.,* 9 Cir., 1964, 335 F.2d 932; *Girardi v. Gates Rubber Co. Sales Div., Inc.,* 9 Cir., 1963, 325 F.2d 196. These rules are so well established as to have become clichés.

In this case, Ysrael's own testimony as an adverse witness is enough to get the plaintiffs to the jury under the *New York Times* standards. He repeatedly admitted that he did not know whether what he said was true. He repeatedly admitted that he did nothing, or almost nothing, to verify his charges. As to most of his statements, he repeatedly admitted that he knew of no facts to support them; he either relied upon unspecified rumor or upon nothing at all. He simply asserted that he believed that what he said was true. Such an assertion is not enough to support a directed verdict in his favor. If it were, mere swearing could, as a matter of law, defeat any action to which the *New York Times principles* are applicable. See *St. Amant v. Thompson,* 1968, 390 U.S. 727, 732.

Ysrael's counsel does not really dispute the foregoing general propositions. He argues that they do not apply to this type of case. The district judge, in grant-

ing the motion for a directed verdict, took the same position. In his written order, he said:

> "*Actual malice* is a constitutional issue to be decided initially by the trial judge vis-a-vis motions for summary judgment and directed verdict. *Bon Air Hotel, Inc. v. Times,* [*sic*] *Inc., supra.* [5 Cir., 1970, 426 F.2d 853]
>
> In making this judgment, the Court will judge the credibility of the witnesses and draw its own inferences from the evidence.
>
> . . . Truth or falsity of a publication, however, is not the constitutional test. The constitutional test is that the statements must be published with actual knowledge of their falsity or with reckless disregard of their falsity.
>
> As has been noted before, actual malice is a constitutional issue to be determined by the trial judge on a motion for a directed verdict.
>
> The Court has found from the evidence—testimony of the witnesses and the admitted exhibits, —that the plaintiffs have failed to establish by a clear convincing evidence that the defendant did publish the statements or articles with actual knowledge of their falsity or with reckless disregard as to whether or not it is false."

The views involved in the court's order seem to have been first stated by Judge J. Skelly Wright in his concurring opinion in *Wasserman v. Time, Inc.*, D.C. Cir., 1970, 424 F.2d 920, 922-3, an opinion in which Judge Robinson concurred. Judge Wright's position is this:

> "In my judgment New York Times Co. v. Sullivan makes actual malice a constitutional issue to

> be decided in the first instance by the trial judge applying the *Times* test of actual knowledge or reckless disregard of the truth. . . . Unless the court finds on the basis of pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice in the *Times* sense, it should grant summary judgment for the defendant.
>
> . . . If the case survives the defendant's summary judgment motion, the trial court at the close of the plaintiff's case must decide whether actual malice has been shown with 'convincing clarity.' In making this judgmnt the court will judge the credibility of the witnesses and draw its own inferences from the evidence. If the trial is permitted to proceed, the court will be called upon again to make a judgment on the actual malice issue at the close of all of the evidence." (Citations and footnotes omitted.)

What Judge Wright said was not necessary to the decision, because in *Wasserman* the court reversed a summary judgment for the defendant and remanded "for trial on the issues of actual malice, defamation and possible damages." However, we assume that Judges Wright and Robinson may have gone through the exercise that Judge Wright describes.

Judge Wright's views were followed by the Fifth Circuit in *Bon Air Hotel, Inc. v. Time, Inc.*, 5 Cir., 1970, 426 F.2d 858, 864-5. We are not sure, however, as to just how far the court actually went. It summarized the legal position:

> "Numerous courts have found summary judgment for publishers proper where the record is devoid

> of genuine issues of fact as to whether the alleged defamatory statement was published with actual knowledge of its falsity or with a reckless disregard of whether it was true or false. Other courts, however, have not allowed a publisher's motion for summary judgment where facts were presented from which a jury could find that a statement was made with actual malice." (Footnotes omitted.)

We note that this language does not include a reweighing of the evidence, including credibility of witnesses: it merely states the usual rule to be followed when summary judgment is involved. The court's analysis of the facts (pp. 865-7) is similar. It concludes:

> "We are convinced that Bon Air has not presented issues of fact from which a jury could find that Time published the article with actual knowledge of its falsity or with a reckless disregard as to whether or not it was false.[21]"

The following reads:

> "21. The following statement by Judge Tuttle in *McLaney* [*Time, Inc. v. McLaney*, 5 Cir., 1969, 406 F.2d 565] seems pertinent here:
>
> > 'Where * * * it is plain that the record has been fully developed by depositions and affidavits on a motion for summary judgment, and such record demonstrates that, construing all of the facts and inferences to be drawn therefrom in favor of the party against whom the judgment is entered, he would not be entitled to have a jury verdict stand, we have not hesitated to hold that the grant of summary judgment is proper.' 406 F.2d at 571-572."

We find no hint in this language that the judge is to weigh credibility, or to refuse to give a party the benefit of inferences that can legitimately be drawn by a jury. However, because the court did cite and quote from Judge Wright's opinion, we assume that the court in fact went through the exercise that Judge Wright suggests.

We agree with our brothers of the District of Columbia and Fifth Circuits that it is important that judges focus attention on the summary judgment, directed verdict and judgment notwithstanding the verdict procedures in libel actions. When civil cases may have a chilling effect on First Amendment rights, special care is appropriate. Thus, a judicial examination at these stages of the proceeding, closely scrutinizing the evidence to determine whether the case should be terminated in a defendant's favor, provides a buffer against possible First Amendment interferences. The Supreme Court has instructed trial courts to "examine for [themselves] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect." To be unprotected, actual malice must be shown with "convincing clarity." *New York Times, supra,* 376 U.S. at 285-86.

However, with respect, we are not persuaded by the second phase of Judge Wright's analysis in *Wasserman* which suggests that in deciding these motions, the trial court should judge the credibility of witnesses and draw its own inferences from the evidence.

We think that in a libel case, as in other cases, the party against whom a motion for summary judgment, a motion for a directed verdict, or a motion for a judgment notwithstanding the verdict is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of fact. We think, too, that in such cases it is not only not the duty of the judge, or of this court of appeal, to weigh the credibility of the evidence, or to draw inferences in favor of the moving party (except, of course, when no contrary inference can legitimately be drawn), but that neither the judge nor this court on appeal has the authority to weigh credibility or to choose among legitimate inferences in such cases.

The *standard* against which the evidence must be examined is that of *New York Times* and its progeny. But the *manner* in which the evidence is to be examined in the light of that standard is the same as in all other cases in which it is claimed that a case should not go to the jury. If the evidence, so considered, measures up to the *New York Times* standard, the case is one for the jury, and it is error to grant a directed verdict, as the trial judge did in this case.

We do not think that the authorities on which Judge Wright relies sustain his thesis. *Jackson v. Denno,* 1964, 378 U.S. 368, deals with the admissibility of evidence, a very different matter from the weight or credit to be given to admissible evidence. It may well be that its procedure ought to be followed in libel cases—a determination by the trial

judge, on the record, and sufficiently articulated to be helpful to a reviewing court, as to whether plaintiff *has presented* sufficient evidence to go to the jury. But that is a far cry from the next step that Judge Wright would take, that is, a change in the manner in which the judge is to examine the evidence.

Rosenblatt v. Baer, 1966, 383 U.S. 75, 88, deals with privilege—whether the evidence shows the plaintiff to be a public official. It says nothing about how the trial judge is to view the evidence in making that determination.

In *New York Times, supra,* 376 U.S. at 284-6, the Court said:

> "Since respondent may seek a new trial, we deem that considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. . . . We must 'make an independent examination of the whole record,' *Edwards v. South Carolina,* 372 U.S. 229, 235, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.[26]"

And in a footnote, the Court commented on the relationship between such an examination and the constitutional right to jury trial:

> "26. The Seventh Amendment does not, as respondent contends preclude such an examination

> by this Court. . . . But its ban on re-examination of facts does not preclude us from determining whether governing rules of federal law have been properly applied to the facts. '[T]his Court will review the finding of facts by a State court . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.' *Fiske v. Kansas,* 274 U.S. 380, 385-386. See also *Haynes v. Washington,* 373 U.S. 503, 515-516."

We find nothing in this language to indicate that the Court's examination was to disregard the usual rules for determining whether a case should go to the jury. It merely requires a reexamination as to whether the evidence, viewed most favorably to the plaintiff, is sufficient to meet the *New York Times* standard if the jury accepts it.

Subsequent decisions seem to us to bear out the foregoing views. In *Rosenblatt v. Baer,* 1966, 383 U.S. 75, 87, after holding that the case fell within the principles of *New York Times,* the Court said:

> "Moreover, even if the claim falls within *New York Times,* the record suggests respondent may be able to present a jury question of malice as there defined."

There is no hint that the Court reached this position by deciding the credibility of witnesses or selecting between permisisble inferences.

In *Time, Inc. v. Hill,* 1967, 385 U.S. 375, at 391, the Court said:

> "Turning to the facts of the present case, the proofs reasonably would support either a jury finding of innocent or merely negligent misstatement by Life, or a finding that Life portrayed the play as a re-enactment of the Hill family's experience reckless of the truth or with actual knowledge that the portrayal was false."

Again, we find no hint that the evidence was weighed as Judge Wright would weigh it. Reversal was based upon error in instructions to the jury.

In *Beckley Newspapers v. Hanks,* 1967, 389 U.S. 81, the Court reversed on the ground of insufficiency of the evidence, but there is nothing in the opinion to support Judge Wright's thesis. On the contrary, the Court merely held that the proof was not "sufficient to present a jury question." (p. 85) *See also St. Amant v. Thompson,* 1968, 390 U.S. 727, 732; *Rosenbloom v. Metromedia, Inc.,* 1971, 403 U.S. 29, 55.

Nor do the court of appeals decisions cited by Judge Wright support his conclusions. In *The Washington Post Co. v. Keogh,* D.C. Cir., 1966, 365 F.2d 965, we find no hint that the court of appeals was making its own judgment as to credibility. Indeed, the court purported to apply the following rule:

> "First, the right to trial by jury is at stake, so courts must be ever careful to grant summary judgment only when no issue of fact is controverted or turns upon a choice between permissible inferences from undisputed evidence." (at 967.)

Goldwater v. Ginsburg, 2 Cir., 1969, 414 F.2d 324, *Cert. denied,* 1970, 396 U.S. 1049, applies the normal rule (p. 337):

> "Viewing the submitted materials and the inferences which might be drawn from them in the light most favorable to the party opposing the motion' United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed. 176 (1962), the district court properly concluded that a trier of fact should have the opportunity to decide whether appellants were liable to appellee."

So does *Time, Inc. v. Ragano,* 5 Cir., 1970, 427 F.2d 219, 221.

In the present case, the plaintiffs' evidence, viewed in the light most favorable to them, is sufficient to meet the *New York Times* standard. The case should have gone to the jury.

The judgment is reversed and the case is remanded for further proceedings.

WALLACE, Cicuit Judge (Concurring and Dissenting):

I concur that the trial judge applied the wrong standard when he granted the motion for a directed verdict. I believe the majority opinion describes the proper standard to be applied. However, I would remand the case to allow the trial court to reconsider the motion in the first instance under the guidelines established by this opinion.

Appendix C

United States Court of Appeals
For the Ninth Circuit

No. 73-1444

Guam Federation of Teachers, Local 1581 of the American Federation of Teachers, a corporation; Conrad G. Stinson, et al.,
Plaintiffs-Appellants

vs.

Alfred C. Ysrael, a/k/a Al Ysrael,
Defendant-Appellee

[Filed Feb. 22, 1974]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Howard Trapp counsel for the appellee, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41(a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the appellee herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before April 1, 1974.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

/s/ Ben C. Duniway
United States Circuit Judge.

Dated: San Francisco, Calif.
February 19, 1974